CHAPTER 2

THEORY OF PROFESSIONAL REGULATION: A REVIEW OF THE LITERATURE

The licensing literature depicts two models of state-regulated professional licensure. One model views licensure as a means of protecting the public from fraud, the offering of services by the unqualified and other threats to their health, safety and welfare. The other model sees regulation as a process promoted by a profession to limit competition, monopolize the market for, and thereby increase the costs of, their services. In the academic literature, these are presented as competing rationales for licensure, with the overwhelming majority of research and theory emphasizing the interest group aspects of licensure rather than its role in the protection of public health, safety and welfare.

Protection of Public Health, Safety and Welfare

American attitudes toward protection of the public's health, safety, and welfare have undergone historic changes that reflect the state of science and the economy (Burnham, 1996). Early conceptions of health and safety (15th to 19th centuries) were fatalistic, with people resigned to the considerable perils of everyday life. Some care was taken to avoid accidents and injury, but the risks were tremendous and accidents were very common. With the emergence of a modernist view of life in the late 18th and early 19th centuries, corresponding to developments in science and industry and promoting the ideology of human control over the environment, people in America became more proactive in promoting their health and safety on an individual level. Education about the risks that one was exposed to in daily life was believed to be an effective deterrent to accidental injury and death.

During the middle of the 20th century, responsibility for the management of risks shifted from the individual to the collective. This resulted from the growing involvement of public health professionals in accident prevention. Over the next few decades, voluntary approaches to educating individuals on health and safety issues were replaced by the growth of regulations that would protect public health and safety through the creation of safer products and a safer environment. Research indicating that voluntary and personal approaches were not effective contributed to the change in emphasis. Much of the regulated activity involved the work of engineers.

Engineering solutions to health and safety issues dominated during the later decades of the 20th century as Americans' faith in the sciences and technology peaked. However, by the end of the 20th century, a resurgence of emphasis on individual responsibility emerged, possibly due to intensification of the deregulation ethos and corporate concerns over the costs of liability.

Nevertheless, the major justification for professional licensure is that without regulation the public might be harmed. Occupations that become professionalized require careful preparation and claim a distinctive knowledge base. (Wilensky, 1964) Licensing boards verify the qualifications of applicants and test their knowledge to see if it meets minimum standards, a procedure that has been called "preventive enforcement" The goal of preventive enforcement is to keep unqualified individuals from entering practice, thereby reducing the likelihood of their causing injury to the public. The screening out process that occurs prior to licensure is distinct from the disciplinary process. (Shimberg, 1982)

The licensing board also protects the public from incompetent or unscrupulous practitioners by investigating complaints and disciplining licensees (Zhou, 1993). Disciplinary and enforcement actions by the board include citations, reprimands, fines, suspension and revocation of the license. (Shimberg, 1982)

Some scholars are skeptical about the effectiveness of licensing in protecting public health and safety. Although the commitment to safeguarding the health and safety of clients and the broader public is common to the professions, in corporate settings this commitment may conflict with issues of efficiency and profitability. Thus, unlicensed engineers, working under the industrial exemption and depending upon corporate employment, may find their commitment to professional ethics compromised. (Martin, 1992) Studies of disciplinary actions in law and medicine in the 1970s found licensing boards reluctant to discipline licensees for incompetence; many states did not even include incompetence as a basis for discipline. (Gross, 1984, pp 148-151) "In general, boards tend to be more zealous in prosecuting unlicensed practitioners than in disciplining those already licensed." (Gross, p. 148) Inadequate budgets, staff and record keeping were common in agencies charged with oversight responsibilities. Cohen and Miike (1974) attributed the ineffectiveness of licensing boards to four other factors: a reluctance to invoke disciplinary action against fellow practitioners; the threat of lawsuits; the role conflict in being both rule makers and adjudicators; and the usually ambiguous statutory grounds for board sanctions, leading to judicial reluctance to enforce them.

Economic Effects of Licensure

Economists generally view regulation and licensure as a method for professions to decrease competition and inflate wages. Three common objections to licensing among economists are: it is a form of paternalism (potential consumers are being told that they are incapable of making rational choices so the state must make decisions for them); it promotes irresponsibility among consumers because they rely on the judgment of the board rather then researching the qualifications of professionals on their own; and state boards often become captured by the profession being regulated and are then used to promote a monopoly. Economists tend to prefer “free market” approaches instead. (Cagle, 1999)

Howard (1998) suggests that a cause of licensing is the desire of professions to restrict their numbers, which increases wealth by reducing competition. Wealth and sufficient numbers increases a profession's political power, which assists in controlling the regulatory process. The ability of a profession to restrict entry for new practitioners and to control task boundaries increases earnings over the long run for the profession and raises the price of their services due to reduced competition (Kleiner and Kudrle, 1992; Mills and Young, 1999).

Some argue that certification (title) provides information to consumers about the quality of service they can expect (Chan and Leland, 1982, Kleiner and Kudrle, 2000), while licensing (practice) prevents the least costly producers from entering the market, increasing the costs for consumers who would have been willing to sacrifice quality for price. (Shapiro, 1986; Gahvari, 1989; Blevins, 1998) Shapiro (1983) finds that achieving optimal quality standards, such as with occupational licensure, excludes from the market services that some consumers would choose because they are less costly.

However, minimal quality standards also protect consumers from choosing solely on the basis of price, regardless of quality. In the case of engineering, the public that benefits from less costly services being available is primarily business or government. These arguments ignore employees of exempt employers and the public that purchases products and uses facilities developed by these employers, even though they are not direct purchasers of the engineering services. Placing pubic health and safety in the hands of corporations that are beholden first to their shareholders may be placing consumers at risk-- unless it can be determined that what some engineers do has no impact on public, health, safety and welfare, or that some branches of engineering pose less of a threat than others.

Control and Responsibility in the Professions:
The Costs and Benefits of Licensure

Every state in the U.S. has laws regulating engineering practice in some way, yet due to exemptions, a majority of practicing engineers are not licensed (Anderson, 1999). Support for registration is increasing among some branches of engineering that have been indifferent to the idea in the past, for example electrical engineering (Bellinger, 1995). The increased support for licensing correlates with the increase in engineers wanting to go into consulting, where industrial exemptions are not an option. Another motivation is that trained engineers want to distinguish themselves from other technical workers in companies who are being given job titles with the word “engineer” attached. The benefits of licensure are that the engineer can then be in responsible charge of a project, can testify as an expert witness, and can expect higher wages and an improved chance of promotion (Lange, 1993).

Two drawbacks to licensure for the licensee are the cost of obtaining and renewing the license and the lack of comity among many U.S. states. Pashigian (1980), in comparing 24 occupations, concluded that a major effect of licensing is reduced interstate mobility -- an important concern given the concentration of employment in national and international firms. For both the licensee and employer, restrictions on labor force mobility compete with public health and safety arguments for licensing. Feisel (1998) addressed this issue by noting that the benefits and problems of licensure vary with the constituency. This includes not only engineers in private practice and in industry, but engineering faculty, industrial employers, clients and the public at large.

General Theories of Regulation: The Public Interest

Policies regarding professional licensure affect three groups: the professionals being regulated, the clients or consumers of professional services, and those who are affected by the interactions of the professionals and their clients. Those who are affected include employers, employees of exempt employers and the public that purchases products and uses facilities developed by these employers, even though they are not direct purchasers of the engineering services. Balancing the interests and concerns of these diverse groups is the challenge of public policy making.

According to Wolfson, et al., a policy that is designed to protect the “public interest” should strike a fair balance among all relevant interests that need to be taken into account and incorporate principles of efficiency, accountability, fairness, and practicability. (in Rottenberg, 1980) Wolfson et al. argue that in addition to the interests of the parties involved, societal values or principles also influence policy. In the U.S.,

considerations of technical and economic efficiency should be factored into all policy goals. Policies should be developed to ensure that there is minimal waste in the production, distribution, and consumption of professional services, and that the real needs of the consumers and their ability to pay for services are acknowledged. Another principle of importance to policy making in the U.S. is fairness, particularly procedural fairness or due process. This is of particular importance for the professional group. In order to be fair, the licensing procedure must treat all people of similar circumstances according to the same standard, policy enforcement cannot be arbitrary, and changes to policies should include some form of compensation for those whose careers are disrupted because of the change in policy. Practicability is another consideration informing occupational licensure policies in the U.S. New policies should be evaluated for ease of implementation. Practicability applies both to how easy a policy is to put into effect and how easy it is to change if the results are not as intended. Finally, policy must consider the principle of accountability, which requires effective representation of interests and effective dissemination of information to the public. Those who make public policy should be held accountable to those who are affected by their decisions and those who disagree with the decisions must have avenues to seek redress.